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FABRICATION

A Necessary Evil

GARRY WILLS
SIMON AND SCHUSTER, 1999, 365 PGS.

Garry Wills is a man with a mission. He wishes to expose for the falsehood that it is a myth that has bedeviled American history. Teachers of heresy such as Thomas Jefferson and John C. Calhoun have maintained that government, especially the U.S. federal government, is at best a necessary evil. Strict limits to its power must be imposed: otherwise, it will soon impose tyranny.

But Mr. Wills knows better. The anti-government fanatics have supported their false doctrine with legends about the meaning and purpose of the Constitution. Once he clears these away, Wills thinks, people will be ready to accept the truth: energetic government is a good, essential to a well-ordered society.

Before beginning a gentle critique of Mr. Wills's thesis, let me make an admission. He might complain that his views are unlikely to be fairly considered by a follower of Murray Rothbard who writes in a publication named for Ludwig von Mises. Is having me review this book analogous to a critical essay by Stalin on *The Gulag Archipelago*? Perhaps; but Mr. Wills has certainly made my job easy by the extraordinarily poor quality of his arguments.

The main reason to view the state with suspicion is a simple one. Albert J. Nock, one of the figures Wills discusses, developed the point in an especially effective form. The "political means," as Nock called it, rests on coercion. It is parasitic on voluntary production and exchange:

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on its own it makes nothing. If a state is necessary at all (a necessity that Nock and his followers denied) surely it must be kept within rigid bounds.

What, one wonders, can our defender of government say in reply? Has Mr. Wills found some flaw in the argument which has eluded less discerning analysts? Our author disappoints: he does not mention Nock's central argument at all. Instead, he provides an irrelevant discussion of Nock's opinions of the Jews. Even on this peripheral subject, he fails to cite Nock's most important essay, which appeared in the *Atlantic Monthly* (June 1941). See also the debate with John Chamberlain in subsequent issues.

The principal argument against government does not merit mention: but what is to be said in the institution's defense? Mr. Wills's main effort is puerile. He points out, correctly enough, that people cannot function alone. Man is a social animal, who must live cooperatively in order to survive and prosper. To good effect, our author quotes Plato about the imperative need for the division of labor.

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But what has all this to do with the state? The entire point of Nock's central argument is that the state impedes social cooperation. The very points about society which Wills makes constitute, to the anti-statist, strong evidence for his position.

Did I miss something? There appears to be a gap between the premise—exchanges are contracts—and the conclusion—the state is necessary.

Wills knows this objection full well. "What has been described so far is just the exchange of goods. Why does that involve a government, the state" (p. 303)? Wills responds that exchanges are contracts: hence a state is needed as a means of enforcement.

Did I miss something? There appears to be a gap between the premise—exchanges are contracts—and the conclusion—the state is necessary. Where is the intervening matter? All that Mr. Wills says is this: "But without the state the free market could not exist.... A businessman cheated by another businessman cannot form a private police force, to haul the accused into a court which consists of the aggrieved person judging his own case, and then to compel submission

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to the verdict. A third party must do that, in whom a sanctioning power has been recognized.... The state, far from being an enemy of the market system, is both the market's product and its perpetuator" (p. 303).

Even by my tolerant standards, Mr. Wills has gone too far. How can he not be aware that individualist anarchists have proposed that the function of adjudication and enforcement he rightly thinks essential can be handled by private protection agencies? Mr. Wills can, if so inclined, dismiss these suggestions as inadequate: he is hardly within his rights ignoring them altogether.

How odd that Mr. Wills has enlisted in the camp of the Great Railsplitter.

And what is one to make of the last sentence in the passage just cited? If the state is the market's product, then how did the market manage to bring it into being? How can the private market create anything more than a private enforcement agency? Further, suppose that Wills's non-argument is right: we do need a state. Why would anything more than a minimal state that enforces contracts be required? Almost everyone on Wills's list of horrid anti-statists, from Jefferson on down, would have had no trouble endorsing such a night-watchman state. Our author has not noted that he has inadvertently deserted to the enemy.

If Mr. Wills as a political philosopher is a total disaster, he is little better as a historian. Like Abraham Lincoln, he rejects the view that the states created the national government. Quite the contrary, the states were subordinate to the Continental Congress from the inception of the 1776 Revolution: "The colonies did not act, so far as independence was concerned, singly but in concert. The entity that was declared independent was the united body of states...Lincoln was right, after all" (p. 60).

How odd that Mr. Wills has enlisted in the camp of the Great Railsplitter. Not long ago, Harry Jaffa, that keeper of the Eternal Lincoln Flame, denounced Wills as a follower of Calhoun. One awaits with interest Jaffa's reaction to his new disciple.

To return to Mr. Wills's argument, he himself recognizes a problem. What about the Articles of Confederation? "The mere fact that they [the states] took separate votes to enter the Confederation shows that they were not already in it. The full thirteen states did not ratify till 1781.... Those outside the Confederation certainly look like separate entities" (p. 61).

Unfortunately, our author does not find his own objection convincing. He fancies himself a textual critic of skill, able to extract the finest nuance of meaning from a historical document.

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He will tell us the meaning of the Articles.

I cannot say that he acquits himself in this endeavor with entire success. He claims that under the Articles, a state "must stay in the Union unless all twelve other states gave them permission to change the Union or dissolve it" (pp. 62–63). Mr. Wills's sentence does not parse, but never mind: his meaning is sufficiently clear. His assertion that unanimous consent was required for a state to leave the Union grievously misreads Article 13. It is a change in the Articles that requires unanimous consent, not a change of membership in the Union. The Articles do describe the Union as "perpetual," but Wills fails to note that this word can mean "without a fixed term" as well as "forever." Unless he can show that the second meaning was intended, he can get no anti-secessionist mileage out of the word.

Wills does no better when he gets to the Constitution. He places great emphasis on James Madison's nationalistic aims at the Philadelphia Convention and during the First Congress. As he rightly notes, Madison wanted to give the federal government the power to veto laws passed by the state legislatures.

But why does this matter? Madison's proposal of course failed of passage; and the more general aims of Madison at this period form no part of the Constitution as ratified. What counts when interpreting the Constitution, as the late M.E. Bradford never tired of insisting, is the intentions of the members of the state ratifying conventions.

Wills thus falls into fundamental error when he says: "the [anti-government] distortion began very early, when the arguments of Antifederalists against the Constitution were said, only a decade or so after that document's ratification, to be embodied in the Constitution" (pp. 16–17). To secure passage of the Constitution, its advocates often had to offer concessions to Antifederalists at the ratifying conventions. Contrary to Wills, then, it is to a large extent justifiable to read the Constitution through Antifederalist lenses.

Contrary to Wills, it is justifiable to read the Constitution through Antifederalist lenses.

Our author makes many surprising assertions in *A Necessary Evil*. Justice Story's claim that the Second Amendment was intended to help resistance to usurpation of power by the government is brushed aside with "Story is hardly infallible" (p. 215), though Wills is elsewhere glad to mention him when he took a nationalist position (p. 60). Dietrich Bonhoffer thought that Hitler should be killed, but he did not consider doing the job himself (p. 21). Witches in New England

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were hanged, not burned (p. 43). I shall not go on: to catalogue Wills's errors is decidedly not a necessary evil. ✦

Wrestling Reality From Rawls

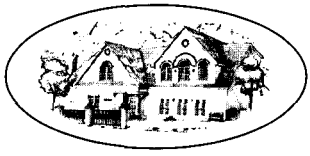
The Quest for Cosmic Justice

Thomas Sowell
The Free Press, 1999, ix + 214 pgs.

Thomas Sowell is an excellent economist, but unfortunately this is not enough for him. He imagines himself a philosopher and an expert on foreign policy as well. As he strays farther and farther from the area he knows, he loses his footing. By the time he reaches his account of the origins of World War II, his book becomes useless.

But he is a fine economist. In a few brief and brilliant pages, he demolishes Lenin's theory of imperialism. Marx claimed in *Das Kapital* that workers in the advanced industrial countries would rise in rebellion as the capitalist juggernaut, unable to cope with cycles of depression, reduced them to ever greater misery.

Marx's predictions were of course belied by the facts, but so trivial a matter did not disturb the faithful. Lenin, following the British radical J.A. Hobson, discovered an escape from destruction for the Marxist system. The harried capitalists could stave off disaster by investing their surpluses abroad. Overproduction, at least for a time, would no longer menace the



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economy, and capitalist and worker in the developed countries could happily join in exploitation of the backward nations.

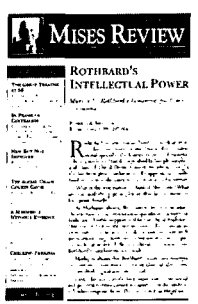
Our author demolishes this farrago with a devastating point. The advanced capitalist countries directed the bulk of their foreign investment to other advanced countries. "The idea that the non-industrial world offered a safety valve outlet for the 'surplus' capital of the industrial world cannot stand up if the industrial nations are investing primarily in each other. This would be adding to their economic and social pressures rather than relieving them, if the Marxian theory of excess capital accumulation were correct" (p. 125).

I have devoted space to this topic in order to show Sowell at his best. It is always my policy to emphasize an author's strong points. The bulk of this book addresses other themes, however; and our author does not always fare so well. Fortunately, Professor Sowell's principal concern in the book stands sufficiently close to economics for his treatment to be valuable.

Professor Sowell has rightly identified a central preoccupation of current moral philosophy. People vary widely in wealth and access to the good things in life; and these inequalities, theorists such as John Rawls inform us, are undeserved. Bill Gates has vastly more money that I; but this does not stem from superior moral merit on his part.

Quite the contrary, he has been lucky and I unfortunate. He does not deserve to benefit from the advantages that nature and nurture have together given him. (Incidentally, would it not be very self-serving of me to adopt this convenient explanation for my failure to do as well as I would like?) The principal task of social policy, Rawls and his followers tell us, is to remedy the unfair results of the natural lottery.

Professor Sowell declines to challenge this position head-on. Quite the contrary, he finds in it considerable merit, albeit only as an ideal. He informs us that "[w]hile a few conservative writers here and there have tried to justify inequalities on grounds of 'merit,' most have not" (p. 4). Virtually everyone admits that inequality, as such, is undesirable and needs justification. But, our author maintains, egalitarians like Rawls make a crucial error. In their zeal to eradicate the malign effects of inequality, they go too far. They strike against inequalities that result from "the way the world is" rather than from collective social decision. "[T]his collective action is not limited to correcting the consequences of social decision...[but] seeks to mitigate and make more just the undeserved misfortunes arising from the cosmos, as well as from society. It seeks



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to produce cosmic justice, going beyond strictly social justice, which becomes just one aspect of cosmic justice" (p. 5).

Given that undeserved inequality is bad, why should the extension of social to cosmic justice be resisted? Why not try to counteract inequality whatever its source? Here Sowell's skill as an economist shows to good advantage.

Social policies often have untoward consequences that policymakers do not intend.

Economists are trained to consider choices among limited alternatives. Not all goods can be obtained simultaneously; and the "opportunity cost," the value of the best alternative not chosen, must always be kept in mind. Further, as F.A. Hayek famously stressed, social policies often have untoward consequences that policymakers do not intend.

Our author applies these considerations to the egalitarian prescriptions, often with fatal effect. Suppose, e.g., that a law forbids delivery companies from refusing to serve neighborhoods with high crime rates. Is it not "unfair," in the cosmic sense, that law-abiding residents of these areas do not get equal treatment?

Perhaps so; but those who wish to compel equal access neglect a vital fact. "We cannot simply 'do something' whenever we are morally indignant, while disdaining to consider the costs entailed.... Once we begin to consider how many deliveries are worth how many dead truck drivers, we have abandoned the quest for cosmic justice and reduced our choices to the more human scale of weighing costs versus benefits" (p. 8).

Sowell is on the mark; likewise important is his stress on the importance of differences in pay to promote greater productivity. But his acquaintance with philosophy often proves inadequate to the job. He rightly takes John Rawls, that most influential of contemporary social philosophers, as his principal target; but his grasp of Rawls's view is problematic.

It is simply false that in Rawls's theory, "no matter how much any given policy might make vast millions of people better off, any small fraction of people at the bottom were in effect to have a veto over that policy. Even if those at the bottom were not made any worse off, no one else could be allowed to become better off without their participation" (p. 82).

Rawls says just the opposite of what our author attributes to him: "It is clearly conceivable," he writes, "that the least advantaged are not affected one way or the other by some changes in expectations of the best off although

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these changes benefit others" (John Rawls, *A Theory of Justice*, Harvard University Press, 1971, p. 82). In this circumstance, Rawls modifies his difference principle to take account of just the inequalities he is alleged to ignore.

But why does it matter if Sowell has neglected an epicycle of Rawls's theory? Am I not, in my usual fashion, grasping any stick with which to flail an author consigned to my tender mercies?

Our author's misleading account of Rawls is symptomatic of a much larger failing. Professor Sowell seeks to avoid direct engagement with philosophy by adducing certain principles of economics which, he alleges, these theories neglect. But Rawls could reply to him: "I don't ignore the principles you correctly emphasize. Incentives are vital, just as you say. The difference principle in fact makes room for incentives. More generally, my theory properly balances concern with productivity with the demands of egalitarian principle."

In my view, the Rawlsian response to Sowell fails. But Sowell lacks the resources to show this. To do so, he would need to confront directly the egalitarian principles he detours around. Does justice ideally demand equality? Are differences in abilities among people in some sense unfair? Unless you are willing to face these questions directly, it is open to the egalitarian to respond in the way I have indicated. Why should we not temper economic efficiency with measures to correct "unfair" inequalities? Rothbard and Nozick have attempted such a confrontation: they deny that the inequalities Rawls complains about are unfair. Sowell ignores their work and thus leaves his case against cosmic justice incomplete.

Sowell ignores the work of Rothbard and Nozick and thus leaves his case against cosmic justice incomplete.

If our author were to flesh out his case in the way suggested, he would in my judgment be vindicated: Rawls and his followers would indeed subject the economy to crippling restraints in pursuit of egalitarian dogmas. Professor Sowell's sin, then, is venial. He arrives at a correct conclusion without adequate basis.

Unfortunately, the same cannot be said of our author's remarks about foreign policy. In pursuit of his theme that cosmic visionaries promote social disaster, our author offers us an account of the origins of World War II. As he tells the tale, realists such as Winston Churchill recognized in the 1930s that British national security depended on a massive arms buildup. By contrast, pacifists and appeasers, foremost

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Sowell could have made a case for his view; in fact he did not.

among them Neville Chamberlain, sought to remedy the injustices of Versailles. These cosmic questers disdained armaments. Like the egalitarians previously considered, they ignored the costs of their principles of justice. In doing so, they almost lost the world to Hitler.

Professor Sowell has ignored the detailed study of his Chicago School colleague, Burton Klein. In his *Germany's Economic Preparations for War* (Harvard, 1959). Klein showed that British armaments were in many categories superior to Germany's. Churchill, apparently accepted by Sowell as a supreme source of wisdom, grossly inflated German rearmament statistics. Further, Sowell's account of Chamberlain is at best one-dimensional. Was Chamberlain's guarantee to Poland in 1939 the act of a starry-eyed pacifist? Our author shows no acquaintance with works by John Charmley and Simon Newman which paint a very different picture of the British prime minister from the caricature he offers.

There is, further, a deeper failing in Sowell's account of the war's onset. He might respond to me that some historians support the interpretation he has given. Have I not begged the question against him by citing only scholars who oppose him?

But that is just the point. Sowell could have made a case for his view; in fact he did not. He shows no acquaintance with the historical literature on prewar diplomacy. Instead, he merely invents a narrative that backs the position he has already adopted. Our protestor against those whose visions lead them to ignore reality is not above a little confabulation of his own. ✦

THE REVISIONIST PROVOCATEUR

A Republic, Not an Empire: Reclaiming America's Destiny

PATRICK J. BUCHANAN
REGNERY, 1999, XIII + 437 PGS.

I opened Mr. Buchanan's book with trepidation. According to press accounts, Pat Buchanan had shed his cloak as a noted conservative commentator to reveal himself as a sympathizer with the Third Reich and its Führer. A recent issue of the *Weekly Standard* (September 27, 1999), that paragon of objective journalism, demands that the Republican Party

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repudiate Mr. Buchanan as an extremist with views alien to American principles.

The accusation against our author precisely reverses the facts. Mr. Buchanan takes for his own the foreign policy encapsulated in George Washington's Farewell Address, the key to understanding America's relations with Europe and Asia from 1789 to 1898. (Incidentally, I am glad that our author avoids the common fallacy that the Farewell Address was actually delivered as a speech [p. 63]).

Washington's Address rested on a simple principle: America's chief business lay on the American continent. The rivalries and power struggles of Europe do not affect in any fundamental way our national interest; accordingly, America should steer clear of European involvements. "'The great role of conduct for us, in regard to foreign nations, is in extending our commercial relations to have with them as little political connection as possible' said Washington, laying down a policy of nonintervention that would guide American presidents for a century" (p. 66).

Such was Washington's advice, but why should we follow it today? Have not conditions changed very much since publication of the Address in 1796? In particular, is not the world a much smaller place than it was two centuries ago? No longer can the United States insulate itself from developments elsewhere in the world.

Mr. Buchanan dissents. Owing to America's immense resources and fortunate geographical position, we need not involve ourselves in European power politics. "No nation has the luxury America does, of time, space, and power, to observe at a distance and assess whether some emergent menace is a true peril—to us.... In the age we have entered, Washington's wisdom is worth revisiting" (p. 365).

Washington's Address rested on a simple principle: America's chief business lay on the American continent.

A problem at once arises. Mr. Buchanan says that our national interest does not require intervention in European affairs, but what is the "national interest?" If, like Mr. Buchanan's *bêtes noires*, the neoconservative "hegemonists," one contends that part of our national interest is to promote democracy throughout the world, then pursuit of that interest dictates interventionism.

But of course Mr. Buchanan's "national interest" differs entirely from what the neoconservatives have in mind. For Buchanan, the national interest encompasses only the physical integrity and economic well-being of our nation. Ideological policies, based on a vision of how the world "should" be are at best a distraction, at worst an invitation to disaster.

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Given this conception of national interest, why should we adopt it as a maxim that dictates foreign policy? Here we reach bedrock in Mr. Buchanan's system. As he sees matters, we live in a Hobbesian world. Nations are engaged in a constant struggle for power. To ask whether they should be so engaged misses the point: the perpetual battle for power is not alterable. Nations rarely allow goals other than national interest to dominate policy. Even so extreme a measure as genocide rarely by itself suffices to induce foreign intervention. "Generally, then, statesmen do not take their countries to war to stop genocide unless their own kinsmen are the victims" (p. 345). A nation must defend its physical integrity.

Mr. Buchanan must now withstand assault from another flank. Those who wish to subordinate power and national wealth to ideology are cast aside by our author as utopians, who blind themselves to the forces that run the world. But what of those who claim that Mr. Buchanan has unduly constricted the world struggle for power?

Nations, our author says, endeavor to preserve themselves in being, and America must of course follow suit. But why stop at the American continent? Why not, as William Seward and Theodore Roosevelt wished, proceed to establish an American Empire?

Mr. Buchanan's answer differs from that of libertarian advocates of nonintervention such as Murray Rothbard. For Rothbard, the coercive exercise of dominion over others violates morality: for Buchanan, it leads to over-extension, weakness, and downfall. Worldwide commitment exceeds the ability of even so great a power as the United States to maintain: "Our situation is unsustainable. The steady expansion of global commitments, as relative national power declines, is a prescription for endless wars and eventual disaster" (p. 34).

Buchanan's criticism of empire and foreign wars thus resembles Mises's assault on economic interventionism. Just as Mises contends that interventionist measures fail, from the viewpoint of their own advocates, to achieve the ends desired, so does Buchanan offer an internal criticism of empire. Nations struggle to attain greater power: but if they do overreach, they will collapse.

For Rothbard, the coercive exercise of dominion over others violates morality: for Buchanan, it leads to overextension, weakness, and downfall.

Mr. Buchanan applies his Washingtonian precepts to great effect in a brilliant analysis of America's entry into both world wars. The United States, he

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holds, had no valid reason to intervene in the European conflict that began in 1914. President Wilson himself recognized in 1916 that "[w]ith the objects and causes of Europe's war...we are not concerned. The obscure fountains from which its stupendous flood has burst forth we are not interested to search for or explore" (p. 208, quoting Wilson).

Interventionists might counter that Germany's resort to unrestricted submarine warfare made the United States's declaration of war inevitable. Our author, a practiced hand at debate, is ready with his counter. Though Wilson professed neutrality, he was undone by Anglophilia, a condition made worse by the even more blatant partisanship of his adviser Colonel House and American Ambassador to London Walter Hines Page. Wilson insisted that Germany strictly comply with neutral rights, but he turned a blind eye to the British hunger blockade of Germany. Wilson thus backed Germany into a corner from which she was unable to extricate herself, and war inevitably followed.

No compelling national interest mandated America's entry into the war.

Buchanan's complaints against Wilson do not stop with the declaration of war. The president committed what for our author is the supreme sin in foreign policy. "In Wilson's call for war can be found not a trace of national interest" (p. 208).

Our author's analysis strikes me as entirely convincing. But he has, I fear, taken a radical step that has landed him into considerable difficulties. However hard it may be to imagine, he thinks that the lessons learned from Wilson's mistakes can be applied to America's entry into World War II.

Our author strongly indicts Roosevelt's aggressively anti-German policy in the period 1939–1941, for a reason readers should by now readily guess. No compelling national interest mandated America's entry into the war.

By late 1941, Mr. Buchanan holds, it was evident that Hitler's bid to dominate Europe had failed. Germany's air campaign against England had been repulsed; and the German army was tied down in massive war with Russia. Hitler's ambitions were directed toward the East rather than to Western Europe and America: why then was the United States at risk from Hitler in 1941?

Buchanan's question, I should have thought, is entirely reasonable given the nationalist, Washingtonian axiom from which he starts. But he has met with fire and fury from those who have not yet heard that the war ended in

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1945. One example of what Buchanan is up against must here suffice. Professor Robert G. Kaufman, writing in the aforementioned anti-Buchanan issue of the *Weekly Standard*, tells us that "[b]y Buchanan's analysis [a rehash of the historian A.J.P. Taylor's revisionist account that Taylor later had the good sense to disavow], Hitler had not wanted war in the West." Kaufman's claim that Taylor repudiated his interpretation of World War II origins is entirely false. Quite the contrary, the "Second Thoughts" that Taylor added to his *Origins of the Second World War* strengthens his interpretation.

Buchanan's Washingtonian axiom offers similar counsel to Rothbard's libertarianism for the world wars, but the two approaches do not always coincide in what they prescribe. In contrast with Rothbard, Mr. Buchanan is a strong partisan of Manifest Destiny; and James Polk ranks high in his pantheon of heroes. And disagreement is not confined to the distant past. Buchanan rejects Rothbard's challenge to cold war orthodoxy. As he sees matters, Nato and other anti-Soviet pacts were temporary measures aimed at countering an imminent Soviet threat.

As such, he holds, they did not violate Washington's axiom. One wonders whether our author has here correctly applied the axiom in question. Was not the primary communist threat to the United States one of internal subversion rather than military action? Just as Hitler was in no position to assault the United States in 1941, so were the Soviets powerless to overthrow an American nation with Washingtonian limits to its commitments.

Was not the primary communist threat to the United States one of internal subversion rather than military action?

Regardless of these differences of opinion, I admire this book for its courageous, principled, and spirited defense of an America First foreign policy. I note, as usual, in my reviews, a few details to carp about. The Austro-Hungarian Empire was not "torn to pieces" by the Versailles Treaty, which dealt with Germany (p. 31). The League of Nations commissioner in Danzig in 1939 was named Carl J. Burckhardt (p. 264). The British Parliament does not declare war (p. 265). ✦

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Miscalculating Human Interest

Luxury Fever: Why Money Fails To Satisfy in an Era of Excess

Robert H. Frank
The Free Press, 1999, ix + 326 pgs.

In 1958, John Kenneth Galbraith assailed American spending patterns. Consumers, he told us in *The Affluent Society*, spend too much on such fripperies as large tailfins on cars. As the result of this wasteful spending, the government was starved of the money it needed to provide essential services. Not content to leave ill enough alone, Professor Frank has some forty years later given us an updated and theoretically sophisticated version of Galbraith. Fortunately, a useful idea can be salvaged from his effort.

Mr. Frank spends a great deal of time belaboring the obvious point that the rich have extravagant tastes. The Calibre '89 Patek Philippe wristwatch sold for a minimum of $2.7 million. For the less financially secure, bargain Patek Philippes can be had for $17,500. In Beverly Hills, California, 17 mansions with more than 10,000 square feet of living space were sold in 1997 (p. 21). Yachts can cost over $1.5 million per year to maintain (p. 23). And so on and so on.

All no doubt fascinating, if you are interested in this sort of thing, but why is luxury spending a problem? If rich people spend their money in a way Mr. Frank considers wasteful, is that not their business? No, our author replies: to take consumer preferences as givens not subject to rational criticism is to ignore important issues.

Those who pay $50 for a cigar are, by hypothesis, increasing their utility: otherwise they would not buy the cigar. But do these purchases, and others like them, really make consumers happy? Economists uncritically assume that preference satisfaction makes for happiness, but psychologists know better. "Unlike economists, psychologists and other behavioral scientists tend to have few preconceptions about the extent to which free-market transactions promote human satisfaction. Their approach is an empirical one that attempts to measure human satisfaction and identify the factors that influence it" (p. 67).

Not content to leave ill enough alone, Professor Frank has some forty years later given us an updated and theoretically sophisticated version of Galbraith.

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By "happiness," Mr. Frank means "life satisfaction," and the point he is concerned with is this. Even if you get what you choose, so your utility as economists define it increases, you may not find your life more satisfying. How does Mr. Frank know this?

The assured results of modern psychology, he replies, tell us. "[W]hat the psychologists call subjective well-being is a real phenomenon. The various empirical measures of it have high consistency, reliability, and validity" (p. 71). These measures bring bad news for luxury spenders. "One of the central findings in the large scientific literature on subjective well-being is that once income levels surpass a minimal absolute threshold, average satisfaction levels within a given country tend to be highly stable over time, even in the face of significant economic growth" (p. 72).

This appears paradoxical but in fact is not. How can it be that if you get the goods you want, you do not feel subjectively better? The answer, our author thinks, lies in the fact that people quickly adjust to a higher standard of living. If you sell your 3,000 square feet home and purchase one twice as large, you may at first feel elated. Soon, though, you will treat the new conditions as normal, and the extra space will give you no special thrill. You will have gone to a good deal of trouble and expense to wind up about as happy as you already were.

Mr. Frank has resolved his paradox only to raise another in its stead. If the pursuit of material wealth beyond a certain point does not lead to greater happiness, why do people continue to seek more and better things? If "the more we have, the more we seem to feel we need" (p. 74), will not at least some people after a while realize that the quest for more leads nowhere? If so, will they not rest content with what they have?

Even if you get what you choose, you may not find your life more satisfying. How does Mr. Frank know this?

A further fact explains our getting and spending. People become happier by improvements from their position in the recent past. To an even greater extent, they dread a reduction in their standard of living. "The economist Richard Thaler coined the term *loss aversion* to describe this tendency. Loss aversion means not just that the pain of losing, say, $1,000, is larger, for most of us, than the pleasure of winning that same amount. It means that it is *much* larger" (p. 105).

Once more, our author has resolved a difficulty only to confront an even more formidable obstacle. If he is right, he has explained luxury spending:

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people wish to beat out others in the battle for prestige and power. They may find, once they have gotten their Patek Philippe watches, that these items evoke no long-lasting spasm of delight. Nevertheless, the struggle counts more than the arrival, and people always act to increase their happiness.

But here precisely is the problem for our social-reformist author: there appears to be no problem that requires tinkering with capitalism. If people did not have rivalrous impulses, maybe they would find it much easier to be happy. But Professor Frank cannot suggest a program to extinguish these desires, since he holds that evolution has implanted them firmly within us. Our author has explained the world, but what room has he left to alter it?

At last we are in a position to see Frank's major innovation: he has found a way to come to a Galbraithian conclusion without casting himself as a stern moralist who presumes to tell others what they "should" want. He argues that the struggle of rivals for material goods generates negative externalities. If these "public bads" can be reduced, people can seek superiority at less cost. This will free resources for projects that will genuinely increase happiness. Suffice it to say that these projects, including expanded public education, food inspection, and highway maintenance involve heavy government spending.

The negative externalities that concern our author can best be understood through an example. Among offensive linemen in professional football, it is an advantage to weigh more than one's rivals. "[O]ther things being equal, the job will always go to the larger and stronger of two rivals. Because size and strength...can be enhanced by the consumption of anabolic steroids, individual players confront compelling incentives to consume these drugs. Yet if all players take steroids, the rank ordering by size and strength—and hence the question of who lands the jobs—will be largely unaffected" (p. 154). Given the danger of steroids, would not players all be better off if the drugs were banned?

The author has found a way to come to a Galbraithian conclusion without casting himself as a stern moralist who presumes to tell others what they "should" want.

Mr. Frank generalizes the point of his example. A progressive tax on consumption will cut out much of the wasteful spending that rivalrous luxury spending involves. Once more, the spending is wasteful not because our author disapproves of it but because people engage in it only to forestall their rivals.

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I cannot think that Mr. Frank's ingenious analysis gives us a good reason to institute the consumption tax he favors. He has made without evidence a crucial and questionable assumption. Let us return to his football example. He assumes that the rank order of players remains the same, whether or not they take steroids. Resources devoted to steroids are then a deadweight loss.

But why assume this? We have no grounds to assume that the ban leaves everything besides access to the dangerous drug as it otherwise was. Like our author, we may generalize our conclusion. Frank has not shown that a consumption tax will affect all rivals equally. Absent this showing, he has failed to show that rivalrous consumption generates pure waste. His argument collapses.

Further, Mr. Frank provides no support whatever for another key assumption. He devotes much attention to spending by the super-rich, who constitute only a minute part of the population, for what seems to him a compelling reason. If those not among the fortunate few learn of the extravagancies of Bill Gates *et hoc genus omne*, they in turn will spend more than they otherwise would have done. The cancer of wasteful luxury spending thus spreads through the economy.

A pretty theory, you may think. But, so far as I can see, Mr. Frank gives not one word of evidence that this demonstration effect exists. His "argument" is a mere free-floating fancy.

Our author does however have one excellent idea, though this has little to do with the book's central thesis. He points out the great value of saving and growth in capital goods. Through the "miracle of compound interest" deferred compensation now can give savers the means for much greater consumption in the not-too-distant future.

He devotes much attention to spending by the super-rich, who constitute only a minute part of the population, for what seems to him a compelling reason.

One application of this point is especially insightful: "The Social Security system...takes no advantage whatsoever of the miracle of compound interest.... Unlike private savings, our Social Security tax payments are spent almost immediately, and therefore do not draw interest over a period of many years. And this simple fact makes Social Security vastly more expensive than private savings as a means for financing retirement" (p. 103). Well said! Why did he have to write the rest of the book? ✦

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Logic of Law

Brennan and Democracy

Frank I. Michelman
Princeton University Press, 1999,
xii + 148 pgs.

Frank Michelman is famous among law professors for his acute critical intellect, and his powers of demolition are much in evidence in *Brennan and Democracy*. But he has set himself an impossible task. He endeavors to show that the high handed judicial dictatorship of Justice William Brennan—my language, I hasten to add, not Mr. Michelman's—was an entirely proper expression of democratic self-government.

As the author notes, the Supreme Court occupies a paradoxical role in our political system. We live, it is alleged, in a democracy, i.e., a government in which the will of the majority of the people (or at least the voters) prevails. But an unelected body, the Supreme Court, claims the power to set aside duly enacted laws of Congress and the state legislatures. "The Supreme Court's opinion in *Cooper v. Aaron*, issued in the name of the Court as a whole but mainly written by Justice Brennan, declares the Justices 'supreme in the exposition of the law and Constitution.' Similarly, but even more assertively, the decisive opinion in a recent abortion case claims for the Court the role of 'speak[ing] before all others' for 'the Constitutional ideals'... of the country" (pp. 9–10).

How can these assertions of the Court be reconciled with majority-rule democracy? There is an obvious answer to this question, but it escapes our author's convoluted mind. The problem that Mr. Michelman has posed is insoluble—if the Supreme Court has the final say on constitutional matters, then we do not live in a majority-rule democracy.

If the Supreme Court has the final say on constitutional matters, then we do not live in a majority-rule democracy.

Far from adopting this commonsensical dissolution of a false problem, Professor Michelman tightens the paradox further. He rightly rejects theories that postulate a collective will: as if he were a Misesian in good standing, he holds that only individuals act. "We do not understand a nation or a people or a political community to be a being possessed of its own mind, its own ability to feel or experience or decide—possessed...of a capacity for self-directive

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agency for which we have any final, moral reason to care" (p. 14).

Though I think he could have made his point in fewer words, Professor Michelman's defense of the individualist thesis is beyond challenge. And along with the thesis, he advances a moral premise: each person ought to govern himself.

At last we are in a position to consider the ultimate version of Michelman's paradox. Each person ought to govern himself, and this requirement cannot be met by merger into a General Will in the style of Rousseau. How is this requirement to be reconciled with a Brennanesque omnipotent Court?

Of course, no reconciliation is possible. Indeed, self-government, if understood in a robust sense, cannot be combined with majority-rule democracy, let alone with what our author has in mind. If you must subordinate yourself to the decisions of others, then you do not govern yourself: it is as simple as that.

Among philosophically inclined lawyers of leftist bent, Ronald Dworkin stands foremost. He has endeavored to solve Michelman's paradox; but our author finds Dworkin's approach wanting.

Cutting through numerous complications, Dworkin's answer is in essence this: Morality demands that everyone be treated with equal concern and respect. To secure this noble end, in our American system, certain provisions of the constitution must be interpreted in a "moral" way. (A "moral" way is one that suits Professor Dworkin's egalitarian predilections.) What better means of achieving this style of interpretation than a Supreme Court composed of disciples of Dworkin?

You might think that, even if we had a "moral" Supreme Court in Dworkin's sense, Michelman's paradox would remain untouched. Has not Dworkin passed the paradox entirely by? If you thought this, you have underestimated Dworkin.

If you must subordinate yourself to the decisions of others, then you do not govern yourself: it is as simple as that.

Dworkin's "claim is that an independent judiciary can, by rightly construing and effectuating constitutional law, secure fulfillment of certain rational preconditions for an individual's identifying his or her political agency with the lawmaking acts of his or her political community...the practice of judicial review can, if well conducted, solve the Institutional Difficulty. Eureka!" (p. 31).

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Why should you think that the decisions of the Supreme Court that you disagree with are, in a sense, your own decisions?

Michelman's "Eureka!" is not bad, and he elsewhere displays flashes of wit; but, on the whole, he badly needs to retake Dumbbell English. If he cannot spare the time, will he not agree to curtail the incessant "his or hers"? But this is by the way.

The Institutional Difficulty is another name for the paradox: how can a system be one of individual self-government if the ruling authorities sometimes act in ways that particular individuals oppose? Michelman demolishes Dworkin's pseudo-solution to the paradox with consummate ease. Suppose, he asks, that you accept Dworkin's conditions for proper constitutional law. Why should you think that the decisions of the Supreme Court that you disagree with are, in a sense, your own decisions? At best Dworkin has shown that you will regard the decisions as reasonable to accept. But unless you can identify the decisions as your own, the paradox remains.

I commend to readers the outstanding discussion our author presents about this point (pp. 30ff). Michelman's stellar reputation, it is apparent, does not rest entirely on nothing. That said, it is disappointing to see our author's own resolution of his paradox.

His response, so far as I can make out, is simply to throw up his hands in despair. Fair minded people that we all are, Mr. Michelman claims, we recognize that other fair minded people can reasonably differ with us on vexed questions such as abortion and welfare rights. At the same time, we recognize that in a stable political system, rules about basic constitutional issues must be established. The result—I hope you are not surprised—is the Supreme Court in the style of Justice Brennan. Disagree with its decisions all you like, you must recognize—mustn't you?—that Brennanism is the best we can do.

Mr. Michelman has given us a variant of Dworkin's solution, with the latter's bizarre views about identification excised from it. Good riddance—but Michelman has failed to resolve his own paradox. In no discernible sense are people in his sense self-governing. Nor has he even resolved the less exigent version of the paradox with which he began. Even if you recognize both that we need fixed rules and that people cannot be expected to agree about them, how does this make the Supreme Court compatible with democracy? To say "this is the best we can do" is not to say that our best is good enough.

Mr. Michelman does have one crumb to throw us. The "empowered basic-law interpreters, i.e., Brennan

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and his colleagues, are exposed to the full blast of sundry opinions and interest-articulations in society, including on a fair basis everyone's opinions and articulations of interests" (p. 60). Again, behold this master of English prose in action! In sum, if you are lucky, Brennan will listen to you.

Will Justice Brennan, or his acolytes on the Court, listen to your views? Don't bet on it.

Or will he? When Michelman gets down to informing us of Brennan's principles of interpretation, it quickly develops that he does not listen to "the full blast of sundry opinions." Neither does he believe in fixed principles. (I speak of Brennan in the present tense, although he is no longer with us. Unfortunately, his spirit lives on.)

As Mr. Michelman presents his hero, Brennan was a "romantic constitutionalist." He believed that institutions must be designed so that individuals "transcend their customary modes of behavior" (p. 69). Somehow, this translates into abolition of capital punishment, welfare rights, affirmative action programs, and other nostrums of the left. In what way these programs promote "transcendence" and the romantic self, I am at a loss to discover. And what if you disagree with Brennan's brand of advanced thought? Will he, or his acolytes on the Court, listen to your views? Don't bet on it. ✦

A Case of Myth Taking Identity

John Stuart Mill on Liberty and Control

Joseph Hamburger
Princeton University Press, 1999,
xx + 239 pgs.

As usual Murray Rothbard was right. In his *Classical Economics*, he contrasts John Stuart Mill with his father James Mill: "Instead of possessing a hard-nosed cadre intellect, John Stuart was the quintessence of soft rather than hard core, a woolly minded man of mush in striking contrast to his steel-edged father.... Hence Mill's ever-expanding 'synthesis' was rather a vast kitchen midden of diverse and contradictory positions" (Murray N. Rothbard, *Classical Economics,* Edward Elgar, 1995, p. 277).

Joseph Hamburger's excellent study offers striking confirmation of Rothbard's assessment. Mill's *On Liberty* (1859) is normally considered a

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classic defense of freedom of thought and expression. As Hamburger is at pains to show, Mill had another side, sharply at variance with the supposedly pure libertarian position of *On Liberty*.

In this thesis, Hamburger is not original. Other scholars have detected a whiff of the authoritarian in Mill. Most notably, the British Tory historian Maurice Cowling "argued that for Mill liberty was not an ultimate value and that the arguments in *On Liberty*, and in all of Mill's works, were designed to bring into existence a society that would be quite oppressive" (p. xv).

How can he find a scintilla of authoritarianism in *On Liberty*?

By contrast with Cowling, Hamburger holds that Mill displayed both libertarian and authoritarian tendencies in *On Liberty*. Just as Rothbard suggested, Mill was confused and contradictory, even in his most libertarian work. The principal value and originality of Professor Hamburger's book lie in his careful arguments for this thesis.

At first glance, though, Hamburger's view seems obviously false. How can he find a scintilla of authoritarianism in *On Liberty*? Does not Mill there defend "one very simple principle as entitled to govern absolutely" the relations of an individual to society? The "simple principle," of course, is that society is justified in coercing someone only when he harms others. His own good does not provide sufficient warrant to intervene. Further, Mill spells out the consequences of his anti-paternalist maxim in considerable detail. "The fullest freedom of thought and discussion" receives lengthy defense. Surely Professor Hamburger has gone off the rails!

Our author first calls a surprise witness to defend his interpretation: John Stuart Mill himself. In a letter to his friend George Grote, written when planning *On Liberty*, Mill said he "was cogitating an essay to point out what things society forbade that it ought not, and what things it left alone that it ought to control" (p. 3). Incidentally, I am surprised that our author nowhere mentions George's brother John Grote, an important critic of Mill's philosophy.

But where in the text of *On Liberty* is anything authoritarian to be found? Hamburger cites the following passage, which he claims that most interpreters of Mill pass by in silence. "A person may suffer very severe penalties at the hands of others, for faults which concern only himself" (p. 8, emphasis is omitted). The penalties in question are expressions of distaste and contempt for behavior that "reflected the 'lowness or depravation of taste' of 'inferior' persons" (p. 8, citing *On Liberty*, ch. 4).

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Further, the principle that only action that harms others stands subject to regulation is much less libertarian than it appears to be on the surface. Mill had a broad conception of harm to others. Thus, he did not reject laws that prohibit marriage unless the parties can demonstrate that they can support a family. If people were allowed to marry without proof of financial soundness, their children might suffer. The harm to others that allows for regulation here is hardly direct and immediate. Hamburger amusingly cites the English Comtian Frederic Harrison, who called Mill's account of marriage regulation "a Chinese tyranny of an ominous kind."

Hamburger has little difficulty in showing other instances in which Mill seems un-libertarian. He favored, as an instance, using social pressure to curb a long list of dispositions to bad conduct. Professor Hamburger notes that Mill "was prepared to punish not only conduct but faults of character, and this was not likely to enlarge the realm of liberty. Yet it is difficult to find discussion of what Mill says about punishing dispositions in the vast literature on *On Liberty*" (p. 13).

What explains the contradictions of *On Liberty*? According to our author, Mill had a hidden agenda. He thought Christianity was a false religion that inhibited intellectual freedom. He and other superior minds, freed from the shackles of false religion, would, he hoped, assume control of public opinion. Eventually, a religion of humanity would replace the outmoded belief in the Christian God.

Professor Hamburger is certainly right that Mill was no Christian, but in one respect he presses his case too far. He finds in Mill's essay *Theism*, "a few small concessions to Christian believers," made "to reduce enmity between skeptics and Christians." Yet, Hamburger thinks, "[f]ar from backsliding in *Theism* as dogmatic atheists charged, he was being conciliatory as a matter of tactics" (p.141).

Fortunately for Hamburger, his main thesis about Mill and religion can be sustained.

I cannot think this assessment rests on a careful assessment of *Theism*. In that essay, Mill accords considerable weight to the design argument, although he thought it lent support to belief in a limited rather than an omnipotent God.

Fortunately for Hamburger, his main thesis about Mill and religion can be sustained. So long as Mill wished to overturn Christianity through the influence of an intellectual clerisy, Hamburger's point is made: he need not prove Mill an atheist *tout court*.

Control of public opinion by a group of self-styled superior intellects of course recalls Auguste Comte, by whom Mill was greatly influenced. But

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did he not repudiate Comte's scheme for social control as "liberticide?"

Indeed he did; but our author, not to be gainsaid, thinks that Mill never rid himself of fundamentally Comtist ideas. "Mill told Herbert Spencer how much he owed Comte.... Notwithstanding his criticism of Comte's conception of the religion of humanity, Mill had good things to say about it" (p. 127). In particular, Mill strongly agreed with Comte that people must be trained so that altruistic feelings entirely swamp selfishness. (I do not imagine Mill would have liked Ayn Rand.) In sum, Mill remained in essence a Comtian about religion but disagreed with some of the Master's practical suggestions.

Paradoxically, we can accept much of what Hamburger says while retaining a more libertarian reading of *On Liberty* than he allows. Hamburger does not challenge Mill's conflation of control by the state with social control. Quite the contrary, he relies on Mill's advocacy of social control to show him as in part an authoritarian.

But the mainstream classical-liberal tradition has taken a different tack. It distinguishes sharply between coercion—the use or threat of violence—and other sources of pressure. So long as Mill confined himself to the latter, he can remain a libertarian in good standing—though through no intellectual virtue of his own.[1] ✦

[1] I thank Ralph Raico for helpful discussion of this point.

Quelling Jurists' Imprudence

Taking the Constitution Away From the Courts

Mark Tushnet
Princeton University Press, 1999
xii + 242 pgs.

Like most readers of *The Mises Review*, Professor Tushnet is fed up with the Supreme Court. I doubt, though, that his complaint against the Court will have much resonance with most of my readers.

Like most readers of *The Mises Review*, Professor Tushnet is fed up with the Supreme Court.

Mr. Tushnet thinks the Court is insufficiently leftist. The Court has, in recent years, limited affirmative action programs and declined to consider welfare benefits as rights. What is to be done?

Our author responds by throwing into question the supremacy of the

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Court as an interpreter of our basic law. Why need those who differ with the Court's interpretations accede to them? Indeed, why grant the Court at all the power to declare laws unconstitutional?

It is here that the main value of the book resides. In general, his arguments do not depend on his leftist political views. Those of us who think of the Court as a major tool of the left can take over much of what he says: "My argument takes as its audience liberal supporters of judicial review, largely because they have been the most prominent defenders of judicial review in recent decades. The conclusion I offer...is equally applicable to conservative defenders—or critics—of judicial review" (p. 215).

Suppose that you are an official in California faced with enforcing Proposition 187. This, in part, denied free public education to children of illegal immigrants. "A federal court promptly held this part of Proposition 187 to be unconstitutional and barred state officials from enforcing it" (p. 6). (The federal court applied a Supreme Court precedent.)

Suppose further that you disagree with the court's ruling: you think that Proposition 187 is constitutional. (Mr. Tushnet does not add, as he should, that you are right.) Should you obey the court?

To some, the answer is obvious: the Supreme Court (and lesser courts beneath it) say what the law is, and that is that. *Roma locuta, causa finita est*. But why accept this view? Your oath is to obey the Constitution, not the Supreme Court's interpretation of that document. The Court, admittedly, has since *Cooper v. Aaron* (1957) said that its interpretation is final; but so what?

We cannot say that the Court's pronouncement by itself settles the matter without begging the question. Only if the Court is final does its statement that it is preclude further discussion.

Suppose that you disagree with the court's ruling: should you obey the court?

But does not rejection of the Court as final quickly lead to anarchy? A well-ordered society needs to have fixed basic rules. Without them, collapse into chaos impends. Thus, our imagined official should swallow his doubts and conform to the dictates of our judicial masters. Professor Larry Alexander and Frederick Schauer have given the best recent defense of this position, but our author has found a key flaw in their argument.

As he points out in his brilliant critique of them, from the claim that a stable system of basic law is needed, it does not follow that the Supreme Court is the fit agency to provide this. "Alexander and Schauer appear to argue that the rule of law entails their version of judicial supremacy.... But

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their argument actually supports a rather different conclusion. What they establish is that the rule of law entails that a legal system have a set of institutional arrangements sufficient to ensure the [necessary] degree of stability" (p. 27).

The next question is apparent. What institutional arrangement is best fitted to bring about the needed degree of order? Mr. Tushnet maintains, reasonably enough, that this question admits of no *a priori* answer. Only an empirical investigation can help us. Our author finds little reason to think that the Supreme Court, rather than Congress, is best suited for the job.

We must, Mr. Tushnet thinks, have a reasonably stable way of arriving at constitutional interpretations. But he next takes a more questionable step. He denies that there is an objectively correct way to understand what the constitution says. He is, I fear, a zealous member of the Critical Legal Studies movement.

According to these legal deconstructionists, laws have no fixed meanings. All enactments are subject to conflicting interpretations, these interpretations to yet further controversies, and so on forever.

Our author's radical conclusion does not give what to my mind is the correct view a run for its money. The Constitution, I should have thought, means what its drafters and ratifiers intended it to mean; and, fortunately, the main constitutional disputes on this theory admit of ready settlement. The original intent that this theory mandates usually can be discovered. Professor Tushnet himself provides an excellent example to make my case. He refers to "something close to a consensus" among legal academies that the Second Amendment "really does create an individual right" to own guns (p. 30). If original intent can be fixed here, why not elsewhere?

Tushnet raises a problem for originalism, but his difficulty is not insurmountable. He rightly claims that true originalists could not accept the Court's decision in *Brown v. Board of Education*. "One difficulty for adherents of original understanding is that the very Congress that submitted the Fourteenth Amendment to the states for ratification also supported segregated schools in the District of Columbia. Another is that the Amendment's opponents routinely said that it would lead to integrated schools, and its supporters routinely replied that it would not" (p. 156).

Mr. Tushnet denies that there is an objectively correct way to understand what the Constitution says.

Our author, sensing victory, hurries to administer the *coup de grâce*. How can originalists accept *Bolling v. Sharpe*, which outlawed segregation in the District of

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Columbia? "The only relevant constitutional provision the Court could invoke was the due process clause of the Fifth Amendment, adopted in 1791. And, whatever we can say about Congress in 1868, it is surely impossible to believe that the framers of the Fifth Amendment, many of whom owned slaves, thought that they were somehow making segregation by the national government impossible" (p. 157).

But what, other than political correctness, is the problem? Why should the originalist want to accept these two decisions? To reject them hardly commits one to approval of racial segregation. Tushnet himself notes elsewhere, with apparent agreement, the view that the effects of the Court's decision in *Brown* should not be overestimated.

To return to our author's successes, he has, I think, successfully shown that we do not need an authoritative Supreme Court to obtain stability. But what role, if any, should the Court have in constitutional interpretation? Mr. Tushnet's answer is surprising, given one of his contentions.

He maintains that, in the long run, the Court's decisions make little difference; as one might expect, he trots out Mr. Dooley's "The Supreme Court follows the election returns" (p. 134). One would have thought he would argue that it does not matter what role in interpretation the Court is assigned.

He sees matters otherwise. Even if the Court does not in practice have much effect, nevertheless eliminating judicial review holds much promise. It will promote a "populist jurisprudence" in which the people interpret the constitution for themselves.

Mr. Tushnet's populism strikes me as more than a little odd. He cleaves the Constitution in two. The "thin constitution" carries out the ideals of the Declaration of Independence; the First Amendment is a paradigm instance of what this part of the document includes. The "thick constitution" includes procedural matters, e.g., the rule that senators serve six-year terms. Only the thin constitution binds us, on the strange ground that people would probably not risk their lives for the details of the thick constitution. Probably not; but why does this fact cancel the legal force of these provisions? Also, why does Tushnet think that the equality clause of the Declaration of Independence, in Jefferson's interpretation, refers "only to men and owned slaves" (p. 11)?

Mr. Tushnet's populism strikes me as more than a little odd. He cleaves the Constitution in two.

This book contains many useful and provocative ideas, but I suppose that in a work written by a Marxist and Critical Legal Studies partisan, one must expect at least some wackiness. ✦

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